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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1794

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner

v

GEORGE SUMMERS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Now Comes WILLIAM L. CAHALAN, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by EDWARD REILLY WILSON, Chief Appellate Attorney, and TIMOTHY A. BAUGHMAN, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan, entered in the above-entitled cause on December 27, 1979, rehearing denied on February 29, 1980.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 68 Mich App 571; 243 NW 2d 689 (1976) and is appended as Appendix A. The opinion of the Michigan Supreme Court is reported at 407 Mich 432, ____ NW 2d ____ (12/27/79), and is appended as Appendix B. The order denying rehearing is appended as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on April 26, 1976. The judgment of the Michigan Supreme Court was entered on December 27, 1979 (rehearing denied on February 29, 1980). The jurisdiction of this Court is invoked under 28 USC Sec. 1257(3).

QUESTIONS PRESENTED

I

DO DUNAWAY V NEW YORK, ___ US ___, 60 LEd 2d 824 (1979) AND YBARRA V ILLINOIS, ___ US ___, 62 LEd 2d 238 (1979) COMPEL THE CONCLUSION, AS THE MICHIGAN SUPREME COURT HELD THEY DO, THAT THE "STANDARD FOR DETERMINING WHETHER A SEIZURE-DETENTION IS LEGAL IS NOT WHETHER THE POLICE OFFICER'S ACTIONS WERE REASONABLE UNDER THE CIRCUMSTANCES BUT RATHER WHETHER THE POLICE OFFICER HAD PROBABLE CAUSE TO ARREST"?

II

DOES A SEARCH WARRANT FOR PRIVATE PREMISES AUTHORIZE A SEARCH OF REASONABLE SCOPE AND INTENSITY OF PERSONS ON THE PREMISES WHERE THE ITEMS PARTICULARIZED IN THE WARRANT MIGHT REASONABLY BE EXPECTED TO BE CONCEALED ON THE PERSON (PARTICULARLY WHERE THE PERSON HAS STATED HE OWNS THE PREMISES, AND A LARGE QUANTITY OF THE PARTICULARIZED SUBSTANCE, HEROIN, HAS BEEN FOUND IN THE BASEMENT BEFORE HE IS SEARCHED)?

III

WHERE THE JUDGES OF THE COURTS THAT HAVE CONSIDERED THE OFFICERS' CONDUCT HAVE SPLIT 7-5 OVER WHETHER THAT CONDUCT WAS PERMISSIBLE UNDER THE CONSTITUTION, CAN IT BE SAID THAT THE OFFICERS KNEW, OR SHOULD HAVE KNOWN, THAT THEIR CONDUCT WAS NOT PERMISSIBLE UNDER THE FOURTH AMENDMENT, SO THAT THE EXCLUSIONARY RULE SHOULD BE APPLIED?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On October 10, 1974, a team of Detroit Police Officers was dispatched to execute a warrant to search premises located at 9356 Mansfield. The warrant was issued to search the entire premises and seize heroin and any other narcotics and narcotics paraphernalia. The warrant recited that an informant had previously purchased heroin at the Mansfield address from a black male known as "George".

Upon arriving at the premises named in the warrant, police officers Lehman and Conant observed defendant leave the premises to be searched through the front door and proceed down the front porch steps. Officer Lehman approached defendant, identified himself as a police officer, and asked defendant if he lived in the house he had just exited. Upon defendant's affirmative response, Officer Lehman showed him the search warrant and asked him if he could open the door. Defendant replied that he could not because he had left his keys inside, but he could ring someone over the intercom.

One Dwight Calhoun opened the inner door upon defendant's request, but when Officer Lehman identified himself as a police officer and attempted to open the storm door (which was locked) Calhoun slammed the inner door shut in his face. The door was then broken down, and Officer Lehman instructed Officer Conant to bring defendant into the living room where he and the other seven persons in the house were detained while the search was conducted. No frisk was conducted pursuant to this detention.

A search of the premises revealed two plastic bags of suspected heroin under the bar in the basement. It having been determined that defendant was the owner of the premises, he was formally arrested on the narcotics charge. A custodial search of his person

followed, revealing a plastic bag of heroin in his jacket pocket. It was for possession of this heroin that defendant was ultimately charged.

Following a preliminary examination, defendant was bound over for trial. The trial judge granted a motion to suppress the evidence and quashed the information. The Michigan Court of Appeals affirmed the trial court, 68 Mich App 571; 243 NW 2d 689 (1976), and on December 27, 1979, the Michigan Supreme Court also affirmed, holding that the detention of defendant while the search was conducted was without probable cause, and, therefore, based on Dunaway v New York, ___ US ___, 60 LEd 2d 824 (1979) and Ybarra v Illinois, ___ US ___, 62 LEd 2d 238 (1979), unconstitutional. The heroin found in his jacket was thus properly suppressed, being the fruit of an illegal arrest. Three justices dissented, finding that the majority had employed the wrong standard in reviewing the officer's conduct and concluding that the temporary detention was reasonable and therefore constitutional. The dissenting justices found Dunaway v New York and Ybarra v Illinois to be distinguishable.

REASONS FOR GRANTING THE WRIT

I

THE DETENTION WAS REASONABLE AND THEREFORE CONSTITUTIONAL

The majority of the Michigan Supreme Court relied almost exclusively on this Court's decision in Dunaway v New York, ___ US ___; 99 S Ct 2248; 60 LEd 2d 824 (1979) in order to hold that the detention in this case was unconstitutional because not supported by probable cause to arrest to hold respondent to answer for a crime.

> The standard for determining whether a police officer's seizure-detention of a citizen violates the Fourth Amendment is clearly set forth by the United States Supreme Court in the recent decision of Dunaway v New York, . . . Justice Brennan's majority opinion holds that detention of a citizen beyond the narrow scope of Terry v Ohio . . . and its progeny, is reasonable only if supported by probable cause for arrest. Thus, the general standard for determining whether a seizure-detention is legal is not whether the police officer's actions were reasonable under the circumstances but rather whether the police officer had probable cause to arrest. (Emphasis in original; citations omitted).

Petitioner submits that this holding is at odds with numerous decisions from this Court[1] and is the very misconstruction of the Fourth Amendment and Dunaway v New York that Justice White cautioned against in his concurring opinion in Dunaway:

> The opinion of the Court might be read to indicate that Terry v Ohio . . . is an almost unique exception to a hard-and-fast standard of probable cause. As our prior cases hold, however, the key principle of the Fourth Amendment is reasonableness - the balancing of competing interests (citation omitted). 60 LEd 2d at 840

Not only is plenary review necessary to correct the Michigan Supreme Court's erroneous construction of the Fourth Amendment caused by its misreading of

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[1] e.g. Delaware v Prouse, ___ US ___, 59 LEd 2d 660 (1979); Michigan v Tyler, 436 US 499 (1978); United States v Brignoni-Ponce, 422 US 873 (1975); Terry v Ohio, 392 US 1 (1968); Marshall v Barlow's, 436 US 307 (1978).

Dunaway v New York, but the decision is also in conflict with at least one circuit decision, which holds a claim that the occupant of premises which are being searched pursuant to warrant cannot be detained during the search to be "clearly frivolous." United States v Micheli, 487 F 2d 429, 430 (CA 1, 1973)

The circumstances of the present case are appropriate for "generic recognition" of an exception to the rule of probable cause "where more flexibility is essential." (Concurring opinion of Justice White, 60 LEd 2d 841). That is, this Court should recognize that a temporary detention of persons on premises (or on their way out the door as the police approach) which are to be searched pursuant to warrant, until the search is concluded, is reasonable and therefore constitutional. (Such a rule certainly would not be inconsistent with Ybarra v Illinois, which held only that occupants of a public premise, a tavern which is being searched pursuant to warrant may not be frisked; Ybarra does not hold that the patrons may not be detained until the search is concluded).

The dissenting opinion in the Michigan Supreme Court aptly sets forth why, once a reasonableness test is accepted, see Terry v Ohio and Delaware v Prouse, supra, the detention in the instant case should be viewed as reasonable. See Appendix B, pp. 30-38. The precise holding of Dunaway is, after all, that "detention for custodial interrogation - regardless of its label - intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest". (Emphasis added) 60 LEd 2d 838. In the instance of a substantially less severe intrusion and a different governmental interest (primarily the safety of the officers and avoidance of frustration of the warrant) Dunaway does not control. Petitioner urges that plenary review be granted to correct the erroneous construction given the Fourth Amendment by the Michigan Supreme Court due to its misreading of Dunaway v New York and Ybarra v Illinois.

II

A SEARCH WARRANT FOR PRIVATE PREMISES PERMITS A SEARCH OF REASONABLE SCOPE AND INTENSITY OF PERSONS ON THE PREMISES WHERE THE ITEMS PARTICULARIZED IN THE WARRANT MIGHT REASONABLY BE EXPECTED TO BE CONCEALED ON THE PERSON (AND PARTICULARLY WHERE THE PERSON SEARCHED IS KNOWN TO BE THE OWNER OF THE PREMISES AND A QUANTITY OF HEROIN, THE PARTICULARIZED ITEM, HAS ALREADY BEEN FOUND ON THE PREMISES DURING THE SEARCH).

Although the Michigan Supreme Court granted leave on this issue, inexplicably the court did not address it (inexplicably, because resolution of the detention issue adversely to petitioner does not resolve the case if defendant could be searched under the authority of the warrant). Petitioner submits that the search of defendant was justified under the warrant, and that Ybarra v Illinois does not compel a contrary result.

The Michigan Court of Appeals majority rejected Petitioner's argument that since the clothing of defendant was a place where heroin could be located, the search warrant for premises included within it a search of reasonable scope and intensity of defendant's person, as a person present on the premises (and named in the warrant as the owner), saying:

> The prosecutor misses the point of the statute. MCLA 780.651; MSA 28.1259 (1) only authorizes a magistrate to issue warrants to search certain places. Once a warrant has actually been issued,

> it cannot be broadly interpreted. A search warrant must describe the premises to be searched and the property to be seized with particularity, and the executing officers must narrowly follow the description. . . It is true that the magistrate could have issued a warrant to search any individual found on the premises, but he did not do so.. The 'particularity' requirement prevented the police from legally extending the scope of the warrant so as to authorize a search of defendant's person. Summers, 579 (Emphasis added).

Petitioner respectfully submits that this analysis sidesteps the issue, for the precise issue is whether a search of a person pursuant to a search warrant for premises is an extension of the scope of the warrant. Petitioner contends that just as it is clear that a search warrant for a premises need not specify and describe every container, every piece of furniture, within the premises in which the items to be seized might be secreted, neither must it necessarily specify and describe persons. A search of desk drawers, closets, etc. for narcotics would without doubt be considered to be a search of the premises of reasonable scope and intensity; so should a search of persons whose clothing contains places where narcotics might be concealed.

The issue of whether a search warrant for premises will permit a search of reasonable scope and intensity of a person on the premises, where the items named in the warrant could easily be concealed on the person was not, Petitioner submits, settled by Ybarra v Illinois. First, a look at cases from several jurisdictions is in order, though many of the cases deal with the search of personal property of a person present in the premises. In Walker v United States, 117 US App D.C. 151, 327 F2d 597, 600 (1963) cert den, 377 US 956, 84 S Ct 1635, 12 L Ed 2d 500 (1964), the court upheld the search of a wallet and bag held by one who shared occupancy of the residence searched under authority of a warrant, holding that a contrary result:

> . . . would be to suggest that a warrant to search premises may be frustrated by the device of simply picking up the guilty object and holding it in one's hand.

The court also cautioned that "There are obviously situations where the grant of the one (a search warrant for premises) cannot be enlarged to include the other (a search of the person)." (parentheses added).

In Clay v United States, 246 F2d 298, 305 (CA 5), cert den 255 US 863, 78 S Ct 96, 2 LEd 2d 69 (1957), dealing with a similar situation, the court held:

> . . . Appellant attacks the propriety of the court's refusal to suppress the evidence which was taken from Clay while standing on the porch of the Anderson house, assuming the search warrant for the premises was adequate. It is clear that without reference to the legality of the arrest of Clay, which we need not decide, the officers did have full authority under the search warrant to investigate the contents of the paper bag held in Clay's hand while on the front porch of the house. (Emphasis added).

The court, in United States v Johnson, 475 F2d 977 (CA DC, 1973) did not squarely face the question, holding that the search of the purse of a visitor pursuant to a search warrant for premises was proper where the purse was not being held by the person. Thus, the court said, the search was not that of the person, and, nothwithstanding defendant's status as a visitor, the purse could be searched as it could have concealed the items named in the warrant. Johnson, 979. Chief Judge Bazelon, concurring and dissenting, agreed that the suppression order could not stand, but for different reasons. He disagreed that the search of the purse could be justified under the warrant, because the officers knew defendant to be a visitor on the premises. However, Judge Bazelon noted in passing that the warrant would

authorize the search of a person named in the warrant as the occupant of the premises (though apparently not named as a place to be searched):

> The warrant . . . authorized the search of an apartment that was . . . occupied by John Doe alias Pete described as a negro male, 49-50 years, 165 lbs., 5'6", medium complexion. I do not doubt that this authorized the search of 'Pete' as well as his apartment. But the warrant did not authorize a search of an individual the police knew to be a mere visitor in the apartment. Johnson, 980 (Emphasis added).

Thus, it appears that Judge Bazelon would allow the search of a person on the premises pursuant to a search warrant for premises where the items sought could be concealed on the person and the officers executing the warrant do not have knowledge that the person has no nexus with the premises (is a "mere visitor"). At the very least it is fair to say that Judge Bazelon would permit searches of persons named in the warrant as having some nexus with the premises.

The holding was similar in United States v Micheli, 487 F2d 429 (CA 1, 1973). The case involved a search warrant for certain business premises, and the search of defendant's brief case which was within the premises. The items sought were counterfeit notes. The court carefully analyzed the problem, saying that a focus on actual physical possession was at once too broad and too narrow - the approach of "immunizing from a search under sanction of a premises warrant any item within the physical possession of an individual on the premises". (United States v Teller, 397 F2d 494 (CA 7, 1968), cert den, 393 US 937, 89 S Ct 299, 21 LEd 2d 273 (1968), is too broad in that "a search warrant could be frustrated to the extent that there are hands inside the premises to pick up objects before the door is opened by the police," it is too narrow in that many personal effects which may be set down should not be subject to search. The court

turned to an examination of the relationship between the person and the place:

> . . . we base our decision on the fact that, as co-owner of the Hillside press (the premises), appellant was not in the position of a mere visitor or passerby who suddenly found his belongings vulnerable to a search of the premises. He had a special relation to the place, which meant that it could reasonably be expected that some of his personal belongings would be there. Thus, the showing of probable cause and necessity which was required prior to the initial intrusion into his office reasonably comprehended within its scope those personal articles, such as his brief case, which might be lying about the office. The search of his brief case, under these circumstances, was properly carried out within the scope of the warrant. Micheli, 432.

In a concurring opinion Judge Campbell rejected the majority's "relationship of the person to the place" standard, arguing that it "grants possible sanctury to all manner of arguably intimate personal effects carried upon the premises and then set down."

> A search of such objects is neither more nor less intrusive than would be the search of similar objects whose owner, having deposited them, had left the premises before the police arrived. Any search is an invasion of privacy; but I think the cause for issuance of the original warrant allows a search of relevant personal effects not in the possession of their owner as well as of all other relevant objects on the premises. The contraband or incriminating evidence covered by the warrant is as likely to be within brief cases or bags just brought on the

> premises as within other objects in the premises. (Footnote omitted) It is true that if the officer knows the owner of the brief case has no 'relationship' to the premises, he might have less reason to search. But in many cases the police would have no way of knowing, in advance, what is the individual's actual connection with the premises. When the stranger in the betting parlor solemnly announces that he is the family doctor, I am less sure than is the court that I would require the police to believe him - or inquire further before searching his bag. Micheli, 433.

Similarly, Petitioner submits that in cases of search of persons on the premises officers would rarely know the individual's actual connection with the premises, nor should officers be required to believe assertions of "non-relationship." Though the instant case could be justified on a relation of the person to the premises test, since defendant told the officers executing the warrant that he was the owner (see Judge Bazelon's opinion in Johnson, supra), Petitioner agrees with Judge Campbell that the test is unsatisfactory. A search of reasonable scope and intensity of persons on premises pursuant to a search warrant for those premises, where the items sought could easily be concealed on the person, should be permitted on the basis that the pockets of persons are places within the premises just as are desk drawers and closets. Both the majority and the concurrence did remark in passing that personal searches were not permitted pursuant to a search warrant for premises, Judge Campbell stating that such was an "exception" to what he perceived to be the rule that a search warrant ". . . justifies whatever intrusion may result from searching all articles found on the premises having characteristics making it possible for them to harbor the matter described in the warrant." Micheli, 433. As will be set forth more fully subsequently, Petitioner submits that the supposed "exception" is ill-founded and unjustifiable.

Several state courts have also had occasion to grapple with the issue. In People v Pugh, 69 Ill App 2d 312, 217 NE 2d 557 (1966), defendant was convicted of unlawful possession of narcotics as a result of a search of his person when he entered an apartment where police officers were engaged in the execution of a search warrant. The officers had been fruitlessly searching the premises for some fifteen minutes.

The court held:

> . . . the police while engaged in search had reasonable grounds to search Raymond Pugh as well. We agree that the execution of search warrants in narcotics cases is a risky business at best, and unless the police search all persons present on the premises they endanger both themselves and the search they are making. Furthermore, the entry of the defendant onto premises where the police have reason to believe narcotics are concealed provides further grounds for his search. The United States Constitution prohibits unreasonable searches (US Const, Am IV); the search of Raymond Pugh under the circumstances of this case cannot be so classified. Pugh, 315, 316 (Emphasis added).

See People v Kielczynski, 264 NE 2d 767 (Ill App, 1970), where in upholding the search of a person pursuant to a warrant for premises for gambling instruments, implements, and apparatus, the search revealing records of horse race bets, the court said:

> We conclude that the search of defendant's person, who was on the premises described in the instant search warrant, was reasonable and necessary for the execution of the warrant. Kielczynski, 771.

See also People v Harrison, 226 NE 2d 418 (1967); People v McHale, 281 NE 2d 776 (1972).

A barber shop was the premises described in Commonwealth v Snow, 298 NE 2d 804 (Mass, 1973), and the articles named were narcotics and narcotics paraphernalia. Defendant was not the owner of the premises, but was present when the warrant was executed. His coat was hanging on a hook, was searched, and heroin found. The court stated that the search was not a search of the person, but went on to say:

> The warrant authorized a search of the entire barber shop. It did not limit the police to looking at what was in open view and thus obvious. They had the right to search anywhere within the four walls of the barber shop where the contraband described in their warrant might be located. They could search the various rooms, closets or storage places, including possible concealed storage places. They could look on, under, behind or inside any piece of furniture, container or other object in the described premises, lift or remove any object to facilitate their search, and search the pockets, liners or any other parts of articles of clothing where the objects of their search might be secreted. Snow, 812.

See also Commonwealth v Smith, 348 NE 2d 101 (1976).

State v Loudermilk, 494 P2d 1174 (Kansas, 1972) involved the search of a person on the premises. Again, narcotics were the object of the search. The court upheld a statute which permitted the search of persons on premises that are objects of a search warrant, stating also that "we are not content to rest our decision solely on this theory:"

> Narcotics, such as heroin, are easily concealed on a person and may readily be disposed of. Where as in this case, probable cause to believe that a drug is kept or concealed on certain described premises is established to the satisfaction of a proper magistrate, the search of a person found on the premises in the execution of a search warrant is not only reasonable, but necessary to secure effective enforcement of the Uniform Narcotics Drug Act. Loudermilk, 1178 (Emphasis added).

See also State v McClelland, 523 P2d 357 (Kansas, 1974); Martinez v State, 504 SW 2d 897 (Ct App Tex, 1974); Guerra v State, 496 SW 2d 92 (Ct App Tex, 1974).

Several cases state the proposition that a search warrant for premises does not include a right to search persons on the premises. See e.g., People v Lujan, 484 P2d 1238 (Colorado, 1971); City of Tacoma v Mondell, 495 P2d 682 (Wash App, 1972). Most of these cases give little or no discussion to the rationale of such a rule, simply citing United States v Di Re, 332 US 581, 92 L Ed 2d 210 (1947) for the proposition. But in close analysis, Di Re does not support the rule.

Di Re involved a warrantless search. An officer was informed by one Reed that Reed was to buy counterfeit gasoline ration coupons from one Battita. Battita was followed as he went to the appointed place. Officers approached the auto - Reed had coupons in his hand and said he had received them from Battita, who was sitting in the driver's seat. Di Re was a passenger, and the officers had no information whatsoever regarding him. He was arrested and searched, and counterfeit coupons found on his person. The court held that there was no probable cause to search Di Re, nor to arrest him. Such a holding appears eminently reasonable. The opinion, however, contains some unfortunate dicta. The government had conceded that a warranted search of premises would not justify a search

of persons on the premises, (the precise question which is at issue here), and the court reasoned that an unwarranted search of an auto would not justify a search of all occupants. But clearly the facts demonstrate that the officers only had reason to believe Reed and Battita possessed coupons. To cite Di Re for the proposition that a premises directed warrant will not allow a search of the person is thus misleading.

That a police officer armed with a search warrant for premises may conduct a search of reasonable scope and intensity of persons on the premises where the items named in the search warrant could reasonably be expected to be concealed on the person is commended by policy and logic, particularly when the existence of the knock and announce requirements is considered. Before officers executing a search warrant may force entry they must request admittance, giving notice of their authority and purpose. MCLA 780.656. Case law holds that after announcing their authority and purpose the officers before forcing entrance must wait long enough for the inhabitants of the premises to reach the door from the room furthest away. See e.g., People v Harvey, 38 Mich App 39 (1972). Obviously, it would be a simple matter for a person present in the premises to pick up the item named in the warrant and put it in his pocket (where the item is of a sort easily concealed in a pocket). Or, upon seeing the approach of officers a person present in the premises could put the item, (for example a package of heroin), in his pocket and walk out the door. Perhaps not observing the officers, one present in the premises might put the heroin in his pocket and walk out the door, on the way to a delivery. The purpose of the warrant should not be frustrated by such facile maneuvers. A search of reasonable scope and intensity of persons on premises which are being searched pursuant to a warrant, where the items sought could easily be concealed on the person, considering the pockets on the person to be places within the premises and thus covered by the warrant, is a reasonable search,

and thus within the Fourth Amendment. The search in the instant case was within the scope of the warrant.

Petitioner submits also that Ybarra v Illinois, supra, does not control this case. The fact that a place of public accomodation, a tavern, was the premises named in the search warrant is alone sufficient to distinguish Ybarra. Although Petitioner has previously expressed the opinion that the "nexus to the premises" test is unduly restrictive, here defendant was known to be the owner of the premises and heroin had been found in the basement, both before he was searched. Petitioner contends, however, that a search warrant for private premises permits a search of reasonable scope and intensity of persons on the premises where the items named in the search warrant might reasonably be expected to be concealed on the person.

III

THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED WHERE THE OFFICER ACTED IN GOOD FAITH AND, VIEWED OBJECTIVELY, REASONABLY.

The Michigan Supreme Court majority did not hold that the conduct of the officer was unreasonable; rather, the court held that reasonableness was not sufficient to render the detention constitutional. Had the four members of the majority agreed with the three dissenting justices that reasonableness is the test, it may well be that all justices would have found the conduct reasonable. Petitioner submits that the reasonableness of the officer's conduct, even if

insufficient to render the detention constitutional, renders application of the exclusionary rule (which the majority felt compelled to apply by Wong Sun v United States, 371 US 471 (1963))wholly inappropriate. Here, of 12 judges to consider the officer's conduct five have found it constitutional, seven unconstitutional, and none have found it unreasonable.

This Court has made plain that the exclusionary rule is not a personal constitutional right of the person aggrieved, its purpose being to deter, not repair. United States v Calandra, 414 US 338, 348 (1974). Whether or not a suppression remedy should be applied depends on whether exclusion of the evidence would deter willful or negligent police conduct which violated some right of the accused. See United States v Janis, 428 US 433, 446 (1976): "The Court . . . has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct' " (emphasis added), and Stone v Powell, 428 US 465, 486 (1976): "The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights." Accord Brown v Illinois,422 US 590 (1975), opinion of Justice Powell. The test is well-stated in United States v Peltier, 422 US 531 (1975):

> If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment . . . we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it requires that the evidence here be suppressed even if we assume that respondent's Fourth Amendment rights were violated by the search of his car. (Emphasis added) 422 US at 542.

Keeping in mind the observation in Calandra, 414 US at 348, that "Application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," and that in Michigan v Tucker, 417 US 433, 446 (1974), that "where the official action was pursued in complete good faith . . . the deterrence rationale loses much of its force," it becomes apparent that where "the deterrence rationale of the exclusionary rule does not obtain" there is "no legitimate justification for depriving the prosecution of reliable and probative evidence." Brown v Illinois, supra. Nor would admission of the evidence here offend judicial integrity. As recognized in Peltier and Stone v Powell, supra:

> . . . judicial integrity is 'not offended if law enforcement officials reasonably believe in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held the conduct of the type engaged in by the law enforcement officials is not permitted under the Constitution.' 422 US at 538; 428 US at 485, fn 2.

As further support for the proposition that the "imperative of judicial integrity" does not operate to exclude evidence seized in all cases of Fourth Amendment violations, petitioner would point out that evidence seized by private persons in violation of the Fourth Amendment is not excluded in criminal trials. Burdeau v McDowell, 256 US 465 (1921). The requirement of standing to object is another example of a situation wherein a Fourth Amendment violation does not result in suppression. Brown v United States, 411 US 223 (1973). Note should also be taken of the fact that illegally seized evidence may be used for impeachment purposes. Walder v United States, 347 US 62 (1954); Harris v New York, 401 US 222 (1971). In short, the "imperative of judicial integrity" is a corollary to the principle of deterrence. The integrity of the court is

not offended where the court is not sanctioning and thereby encouraging "willful" violations of the Constitution.

In conclusion, petitioner would point out that this Court has held that the decision of whether the exclusionary rule should apply to a given situation involves a balancing process:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police conduct therefore, we must consider whether the sanction serves a valid and useful purpose (Emphasis added). Michigan v Tucker, 417 US at 446.

> . . . when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence. Michigan v Tucker, 417 US at 450.

See also Justice White's dissent in Stone v Powell, supra.

To exclude the truth in a case such as this one, where there is involved no insolent use of authority, and where there is an absence of an incontestable compensating gain, is to inflict "gratuitous harm on the public interest," and is itself an affront to judicial integrity. Plenary review should be granted to consider the appropriateness of application of the exclusionary rule in this case. See Justice Rehnquist's opinion in California v Minjares, _____ US _____ 61 LEd 2d 892 (1979).

CONCLUSION

It is respectfully submitted that for the reasons outlined above plenary review should be granted.

Respectfully submitted,

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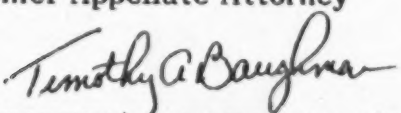

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Dated: March 25, 1980

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Appendix A

People v Summers
68 Mich App 571
Opinion of the Court

Before: Bronson, P.J., and Bashara and M. F. Cavanagh, JJ.

Bronson, P.J. Defendant was charged with possession of heroin, contrary to MCLA 335.341(4)(a); MSA 18.1070(41). Prior to trial, defendant filed a motion to suppress the heroin which was the subject of the prosecution on grounds that it was the product of an illegal search. The trial judge granted that motion, quashed the information, and ordered defendant dismissed. The prosecutor appeals here.

The search in question occurred on the night of October 10, 1974. A team of Detroit police officers were dispatched that night to execute a search warrant for a house located at 9356 Mansfield in the City of Detroit. The warrant authorized a search of the premises, and named defendant as the owner of the house.[1] As the police converged on the above

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[1] A copy of the warrant does not appear in the record. However, the discussion between the prosecutor, defense counsel, and the judge at the preliminary examination indicates the scope of the search warrant:

"Mr. McCloskey (the prosecutor): Under the search warrant, your Honor, they had the authority to search the entire premises.

"The Court: That's in the search warrant?

"Mr. McCloskey: Do you have a copy of the search warrant?

"I would assume that they exceeded their range, your Honor, but that might be proper subject of a different type of hearing in this court. But I would—I don't think that question has been raised.

"Yes, your Honor, it is generally search the premises

location, a man later identified as defendant was observed exiting the house. Patrolman Roger Lehman stopped defendant, and identified himself as a police officer.

When the police learned that defendant lived in the house, they ordered him to unlock the front door.

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known as 9356 Mansfield, which is a 2-story single dwelling. And then it goes on to describe the rest of the--more specifically the type of dwelling it is, and exactly where it is located.

"But it's to search the entire premises.

"The Court: It says that, entire premises?

"Mr. McCloskey: No, it says premises, your Honor, but I think that would assume the entire premises, it doesn't limit it to the first floor or the second floor or any specific room in the place, I think that's a reasonable reading on the face of the search warrant, that it means the entire premises, since it is not limited.

* * *

"Mr. Mitchell (defense counsel): Your Honor, I don't think it (The narcotics seized from the person of defendant) should be admitted. * * * If they had a search warrant they could just serve the search warrant. There is nothing in the search warrant that says they had to search the person of Mr. Summers out on Mansfield. The search warrant was to search the premises. Now they went--

"The Court: what about the fact he was coming out as they were going to execute the search warrant?

"Mr. Mitchell: Well he still was not in the--the search warrant is to search the premises, not to search this man. They had no--they had no--even after the man got in the house they had no cause to search the man."

The prosecutor has never argued here or below that the warrant expressly authorized a search of the person of defendant.

Defendant responded that he did not have his keys with him, and that he would have to use the intercom to convince someone inside to open the front door. Defendant spoke to a person named Dwight over the communication system, instructing Dwight to let him into the house. A few minutes later, Dwight Calhoun appeared at the door. Patrolman Lehman identified himself as a police officer, but Calhoun just stood there. When Lehman tried to open the locked storm door, Calhoun slammed the inside door shut.

Three of the officers quickly moved up and knocked down the front door. As they did so, Officer Lehman observed Calhoun running toward a downstairs bedroom. Lehman started chasing Calhoun after instructing another officer, Anthony Conant, to bring defendant inside. Conant escorted defendant into the house as the other members of the police team "secured" the house.[2] Patrolman Lehman

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[2] Officer Conant was never directly asked whether defendant voluntarily went into the house. A fair reading of the testimony, however, indicates that he had little choice. For example, on cross-examination of Conant, the following exchange occurred:

"Q. (defense attorney): All right. Well when you came around to the front of the house you did see--did you see Mr. Summers, is that right?

"A. I did.

"Q. And Mr. Summers was outside of the house, is that right?

"A. He was.

"Q. Now Mr. Summers was outside of the house, and you took him back in the house, is that right?

"A. I did.

"Q. Now he wasn't a member of your crew, was he?

"A. No, he was not.

"Q. And you didn't think he was going to aid you at all in making this raid, did you?

meanwhile pursued Calhoun into the bedroom, and saw Calhoun toss a "pack" onto the bed. The "pack" was retrieved and was found to contain suspected heroin. Calhoun was placed under arrest and escorted back into the living room. Other persons, variously described as five, six, or eight in number, were found in the house and brought into the living room by other police officers.

After Calhoun was brought into the living room, and the house was otherwise "secured", Conant proceeded to search the whole house. He found two plastic bags of suspected narcotics under the bar in the basement. When Conant returned, defendant again indicated upon questioning that he was the owner of the house and lived there. Defendant was then placed under arrest and searched. Suspected heroin was found in his pocket. All of the other persons in the house were also searched, but there is no indication that anything was found on their persons. Laboratory tests revealed that the envelope found in defendant's pocket contained 8.5 grams of heroin.

"A. I did not know what he was going to do.

* * *

"A. No, I did not. After we gained entry Patrolman Lehman told me to bring him on inside.

"Q. All right. You took him on inside?

"A. I did.

"Q. Now when you went inside, what did you do immediately after you got inside?

"A. Well I was in the living room with Mr. Summers.

"Q. All right. You kept Brother Summers right close to you, is that right.

"A. He was there.

"Q. All right. What did you do after you kept him in your close view like that; did you ever go anyplace else in the house?

"A. Not until after the house was secured, then I went to the basement."

Defendant was charged only with possession of the 8.5 grams of heroin found concealed on his person. Consequently, when the search was ruled illegal and the evidence suppressed, the charges against defendant were also dismissed. The prosecutor on appeal contends that defendant was properly searched.

The prosecutor makes three arguments to justify the search of defendant's person. First, the prosecutor argues that the search warrant authorized a search of the "premises", and that all hiding places located inside the house are part of the "premises". Secondly, the prosecutor claims that, even if this was not strictly a "premises search", a person found in the house when the search warrant is issued can in some cases be searched. A search was justified here because of defendant's presence on the premises, his ownership of the premises, and the reasonable expectation that an item sought would be found on his person. Finally, the prosecutor argues that the police had probable cause to arrest defendant when they found a controlled substance in the property owned by him. The search is then justified as incident to that arrest. We reject all of these legal bases for the search, and affirm the trial court.

The prosecutor's first legal theory is based upon MCLA 780.651; MSA 28.1259(1), which authorizes a magistrate to issue a warrant to search any "house, building or other location or place where the property or thing which is to be searched for and seized is situated". The argument goes as follows: Since the clothing of the defendant is a "place where" heroin could be located, the trial judge must have intended to allow a search of the same pursuant to his warrant for the "premises".

The prosecutor misses the point of the statute. MCLA 780.651; MSA 28.1259(1) only authorizes a magistrate to issue warrants to search certain places.

Once a warrant has actually been issued, it cannot be broadly interpreted. A search warrant must describe the premises to be searched and the property to be seized with particularity, and the executing officers must narrowly follow that description, Marron v United States, 275 US 192, 196; 48 S Ct 74, 76; 72 L Ed 231, 237 (1927), People v Franks, 54 Mich App 729; 221 NW2d 441 (1974). It is true that the magistrate could have issued a warrant to search any individual found on the premises, but he did not do so. The "particularity" requirement prevented the police officers from legally extending the scope of the warrant so as to authorize a search of defendant's person.

The Prosecutor argues in the alternative that the courts of other states have allowed the search of individuals found on the premises to prevent the complete frustration of the warrant. Otherwise, it is claimed, occupants would simply conceal contraband upon their person as the police announce their presence. Applying the test found in those cases, the prosecutor states that there was "reasonable cause" for the police to believe defendant had upon his person property subject to the warrant. Particular accent is put on defendant's presence on the scene and his ownership of the house.

Our courts have never explored the extent to which persons found upon the premises as a search warrant is executed can be searched without another warrant. This is not the occasion to decide that issue, for all of the cited cases require at the very least presence upon the premises being searched. That factor cannot be found here. The defendant was stopped outside of the house. There hardly could be any items on his person which were subject to the search warrant, since the items too were outside the designated premises. Taking defendant back inside did not change the situation. Even if the police acted legally in doing so, an issue we do not decide here,

failure to search defendant's person certainly would not "frustrate" the execution of the warrant. There could be little fear that items in the house would be taken and concealed by defendant, who was being detained and watched by Officer Conant.

The prosecutor's final claim is that the police had probable cause to arrest defendant for possession of the narcotics found in the basement of the house. If that contention is true, then the police properly searched the person of defendant incident to that arrest. The trial judge, however, ruled that the police lacked probable cause to arrest the defendant. He found People v Davenport, 39 Mich App 252; 197 NW2d 521 (1972), to be controlling here, and we agree.

In Davenport, police officers went to a house where defendant resided with three other persons for the purpose of executing a search warrant for those premises. As the police broke down the door to gain entry, they observed the defendant running upstairs with a small box. The police reached an upstairs bathroom in time to retrieve three envelopes and a bit of loose marijuana as the defendant attempted to flush them down the toilet. Marijuana was also found in those envelopes. A search of the whole house was then conducted, and a bag of narcotics paraphernalia and .26 grams of heroin were found in the basement. Both items were at the bottom of a barrel of soiled clothes, and the heroin was contained in a prescription bottle, bearing defendant's name, for another, non-narcotic drug.

The Court in Davenport held that there was insufficient evidence to support a jury verdict convicting Davenport of possession of the .26 grams of heroin. Judge, Now Justice Levin, writing for the Court, expressed the reasoning of the panel as follows:

"Davenport cannot be convicted on the theorem that someone must have been in possession of the heroin.

"Davenport's residence in the house and the presence in the bag of a plastic bottle carrying a label bearing his name were the only evidence connecting him to the heroin found in the brown bottle. Four persons lived in the house. It is not reasonable to infer from the fact that Davenport was one of the occupants that he--rather than Phillips or Brown or Green--was the person who placed the capsules in the brown bottle. In addition to the plastic bottle labeled with Davenport's name, there were two plastic bottles bearing the name of one of the other residents. Ardis Phillips. There was no evidence that the brown bottle, the bag, or the barrel belonged to Davenport. Clearly there were innocent theories--unrebutted by any evidence--which accord with the facts. It is as likely that Ardis Phillips or anyone else living in the house, who would have had equal access to the basement, was in possession of the heroin.

"More than mere association must be shown to establish joint possession. 'An additional independent factor linking the defendant with the narcotic must be shown.' " 39 Mich App 252, 256-257. (Emphasis supplied, footnotes and citations omitted.)

While the Court found there to be sufficient evidence to find defendant guilty beyond a reasonable doubt of possession of the marijuana, a general verdict required reversal.

Davenport stands for the proposition that joint control of a dwelling house is insufficient to sustain a conviction for knowingly possessing an illicit drug contained therein without some further evidence connecting the defendant with that drug. The prosecutor accurately points out that Davenport was directly concerned with guilt beyond a reasonable doubt, while the present situation involves the lesser "probable cause" standard. However, the principles of Davenport still apply.

In assessing probable cause, the quantum of proof is different, but there still must be some evidence of the type or quality necessary to support a conviction. That concept was well stated by Justice Levin in his dissenting opinion to People v Smith, 49 Mich App 630, 630-640; 212 NW2d 768 (1973), rev'd on other grounds, 393 Mich 432; 225 NW2d 165 (1975), in the context of an arrest for carrying a concealed weapon:

"The majority apparently agree that the evidence is insufficient to convict Smith, but hold that it is adequate to support the binding-over decision. The standard of jury persuasion is indeed higher than the standard which guides the magistrate. But we are not concerned with the weight to be given an inference in assaying guilt or innocence, but rather with a question of law: Should the trier of fact be permitted to infer from the evidence that Smith was carrying a concealed weapon? If the answer to that question is, as I believe, that the trier of fact should not be permitted to draw that inference, then the people have failed to establish an element of the offense." (Emphasis supplied.)

There must be at least some evidence of an additional independent factor linking the defendant with drugs found on the premises, although the weight to be given to the factor need be less to support an arrest.

That concept is illustrated by Johnson v United States, 333 US 10; 68 S Ct 367; 92 L Ed 436 (1948). In that case, a Seattle police narcotics officer received information that unknown persons were smoking opium in the Europe Hotel. Federal narcotics agents were called and accompanied the Seattle police officer to the hotel. A strong odor of burning opium was detected outside room number 1. The agents knocked, and a voice inside inquired as to who was there. The police officer identified himself, and there was a slight delay during which noise was heard in the room. Defendant opened the door, and the police officer told

defendant he wanted to talk to her. She acquiesced and admitted the officer. Defendant, found to be the sole occupant of the room, was "arrested" and the room was searched. Opium and smoking apparatus were found.

Although the defendant clearly had at least joint control of the premises and drugs were determined to be present there, the Supreme Court held that no probable cause existed to support her arrest. The required additional factor, that she was the sole occupant of the room, was not discovered until after the defendant was arrested:

"The Government, in effect, concedes that the arresting officer did not have probable cause to arrest petitioner until he had entered her room and found her to be the sole occupant. It points out specifically, referring to the time just before entry, 'For at that time the agents did not know whether there was one or several persons in the room. It was reasonable to believe that the room might have been an opium smoking den.' And it says, ' * * * that when the agents were admitted into the room and found only petitioner present they had a reasonable basis for believing that she had been smoking opium and thus illicitly possessed the narcotic.' Thus the Government quite properly stakes the right to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after, and wholly by reason of, their entry of her home. It was therefore their observations inside of her quarters, after they had obtained admission under color of their police authority, on which they made the arrest.

"Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do." 333 US 10, 16, 17. (Footnotes omitted.)

Johnson, then, indicates that the quality of the evidence must be examined in making the probable cause determination.

Certain additional factors found to be sufficient to link the defendant to drugs found on the premises reappear frequently in the cases. These include: (1) attempted flight and destruction of the evidence by the defendant, People v Davenport, supra, (2) close proximity to the narcotics, People v Davenport, supra, 256, fn 4; Ker v California, 374 US 23, 36, 37; 83 S Ct 1623; 10 L Ed 2d 726 (1963), Commonwealth v Anderson, 224 Pa Super 19, 23; 302 A2d 504, 506 (1973), (3) the existence of reliable information that defendant is trafficking in drugs of the type found in plain view, Davis v United States, 327 F2d 301 (CA 9, 1964), (4) the linking of defendant directly to the specific property in which the drugs are found, such as through his admission of its ownership, Carlo v United States, 286 F2d 841 (CA 2, 1961), cert den, 366 US 944; 81 S Ct 1672; 6 L Ed 2d 855 (1961), and (5) knowledge by the defendant of the precise location of the drugs, People v Davenport, supra, 256, fn 4. There are undoubtedly other proper factors, but these are the ones most frequently appearing.

In the instant case, none of those additional factors were present. Defendant was known to be the owner and an occupant of the house, and drugs were found in an out-of-the-way place in that house. However, there was no other evidence linking defendant to those drugs at the time of his arrest. We have the same set of facts as described in Davenport--mere joint occupancy by the defendant with others of a dwelling in which illegal drugs are located. It is certainly "as likely" that Dwight Calhoun, or one of the other persons on the premises, placed those drugs in the basement.

Under those circumstances, we must hold that the police officers had no probable cause to arrest

defendant for knowingly possessing the drugs found in the basement of his house. The seizure of the heroin involved here cannot be justified as the product of a search incident to arrest. Since the other possible legal bases for the search have also been rejected, we must uphold the decision of the trial judge suppressing the evidence and quashing the information.

Affirmed.

M. F. Cavanagh, J., concurred.

Bashara, J. (dissenting). I respectfully dissent from my Brothers' opinion. I believe there was probable cause to arrest the defendant, and that the search of his person was a lawful search incident to an arrest.

In Michigan a peace officer may arrest a person without a warrant "when he has reasonable cause to believe that a felony has been committed and reasonable cause to believe (that) such person has committed it". MCLA 764.15(d); MSA 28.874(d). Each case must be analyzed in light of the peculiar circumstances facing the officer. Wong Sun v United States, 371 US 471, 479; 83 S Ct 407; 9 L Ed 2 d 441 (1963), People v Orlando, 305 Mich 686, 689; 9 NW2d 893 (1943).

Case law teaches that the police officer makes his determination as to whether the person arrested has committed a felony not as a legal scholar, but as a man of reasonable prudence and caution. People v Harper, 365 Mich 494, 501; 113 NW2d 808 (1962), cert den 371 US 930; 83 S Ct 302; 9 L Ed 2 d 237 (1962). Likewise, Draper v United States, 358 US 307, 313; 79 S Ct 329; 3 L Ed 2 327 (1959), recognized that in assessing probable cause one deals in "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

In the instant case the police were armed with a warrant to search the premises at 9356 Mansfield for narcotics. This indicates the police were aware of narcotics activity taking place at that address.

On entry to the home the police immediately arrested one Calhoun who had attempted to discard a "pack" of heroin. A search of the premises uncovered more heroin in a common area of the home. At that point, although there were approximately six other citizens in the house, the police arrested only the defendant, who had previously admitted that he lived there and was the owner. It was reasonable for the police to infer that he controlled the premises as well as any heroin found there. See People v Hintz, 62 Mich App 196; 233 NW2d 228 (1975).

It is my opinion that the majority has analyzed probable cause under the wrong standard. It is important to remember that a policeman is not a lawyer. He need not analyze the elements of the offense to determine whether there is sufficient evidence to convict. Wong Sun v United States, supra. This is clearly the function of the courts. See People v Davenport, 39 Mich App 252; 197 NW2d 521 (1972).

My Brothers' reliance on People v Davenport, supra, is misplaced. In Davenport, Justice (then Judge) Levin determined there was insufficient evidence to find the defendant guilty beyond a reasonable doubt of possession of narcotics. The drugs were discovered in a common area of a house which was under the joint control of a number of persons including the defendant. This does not mean there was no probable cause to arrest. The quantum of proof needed to convict is greater than that required for probable cause to arrest. Justice (then Judge) Levin recognized the difference in People v Degraffenreid, 19 Mich App 702, 708 n 2; 173 NW2d 317 (1969), when he stated:

"While mere presence, even with knowledge that a criminal offense is about to be or is being committed, is not enough to support a conviction of a person as an aider or abettor under the statute * * * such presence is enough to establish probable cause justifying an arrest." (Citations ommitted.)

Finally, I cannot agree that Johnson v United States, 333 US 10; 68 S Ct 367; 92 L Ed 436 (1948), is dispositive. In that case the government argued that probable cause existed to arrest once the police discovered the petitioner was the sole occupant of the room. The United States Supreme Court in a five to four decision held that the police illegally gained entrance to the room under color of police authority. Therefore, the arrest could not be justified by any facts that occurred after they gained entrance. The Court did not reach the issue of whether probable cause to arrest existed where petitioner was the sole occupant of a room where narcotics were found. Nor did it reach the crucial issue of the instant case, as to whether there would have been probable cause to arrest had there been more than one occupant in the room.

I would reverse the trial judge and reinstate the charges against the defendant.

Appendix B

People v Summers

Docket No. 58465. Argued October 5, 1978 (Calendar No. 10).--Decided December 27, 1979.

#10/October 1978

STATE OF MICHIGAN
SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,
v No. 58465
GEORGE SUMMERS,
Defendant-Appellee.

BEFORE THE ENTIRE BENCH

BLAIR MOODY, JR., J.

On October 10, 1974, a team of Detroit police officers was dispatched to execute a warrant to search premises located at 9356 Mansfield. The warrant was issued to search the premises and seize heroin and any other narcotics materials and paraphernalia, but did not specify persons to be searched. The owner of the premises was not named in the search warrant. The only reference to a particular person was a statement contained in the warrant indicating that the informant had previously purchased heroin at the Mansfield address from a black male known as "George".

Upon arriving at the named address, Officer Roger Lehman saw the defendant go out the front door of the house and proceed across the porch and down the steps. When defendant was asked to open the door he replied that he could not because he left his keys

inside, but he could ring someone over the intercom. Dwight Calhoun came to the door, but did not admit the police officers. As a result, the officers obtained entrance to the premises by forcing open the front door. Once admittance had been gained Officer Lehman instructed Officer Conant, previously stationed along the side of the house, to bring the defendant, still on the porch, into the house.

After the eight occupants of the house were detained, a search of the premises revealed two plastic bags of suspected narcotics under the bar in the basement. After finding the suspected narcotics in the basement and upon determining that the defendant was the owner of the house, Officer Conant formally arrested the defendant for violation of the Controlled Substances Act of 1971. MCL 335.341(4)(a); MSA 18.1070(41)(4)(a). A custodial search conducted by Officer Conant revealed a plastic bag containing suspected heroin in the defendant's jacket pocket. It is this heroin, discovered on the person of the defendant, that forms the basis of the instant possession charge.

Following a preliminary examination, defendant was bound over for trial. On November 19, 1974, the trial court granted a motion to suppress the evidence and quashed the information. Subsequently, the Court of Appeals affirmed the trial court. 68 Mich App 571; 243 NW2d 689 (1976). We granted leave to appeal on February 8, 1977. 399 Mich 838 (1977).

The dispositive issue presented for resolution is whether the police officers had probable cause to arrest the defendant without a warrant when defendant was seized and detained while leaving his home prior to execution of the premises search warrant.

Statutory authority for an officer to arrest without warrant is set forth in MCL 764.15; MSA 28.874, which provides in relevant part:

"Any peace officer may, without a warrant, arrest a person --

* * *

"(d) When he has reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person has committed it."

Probable cause for an arrest has been defined as any facts which would induce a fair-minded person of average intelligence and judgment to believe that the suspected person has committed a felony. People v Ward, 226 Mich 45; 196 NW 971 (1924). Furthermore, the facts upon which such belief is based must be present at the moment of arrest. People v Stewart, 232 Mich 670; 206b NW 337 (1925).

Therefore, in reviewing a claim that a police officer lacked probable cause to arrest, the reviewing court must determine whether facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected person had committed a felony. Each case must be analyzed in light of the particular facts confronting the arresting officer. People v Harper, 365 Mich 494; 113 NW2d 808 (1962).

According to the facts, defendant had left the premises before the search party arrived and was proceeding down the front porch steps when approached by Officer Lehman. At that point in time, Officer Lehman detained the defendant for purposes of limited inquiry and ascertained that the defendant lived at the named premises. There is no evidence that a frisk of the defendant was made. Defendant's behavior pursuant to the police officer's request for admittance to the premises can be categorized only as cooperative.

However, the testimony of Officer Conant at the preliminary examination indicates that the defendant was not free to leave the front porch as the premises

search warrant was being executed, but was instead escorted into his house and deprived of his liberty.[1] At that time the initial inquiry and cooperative response terminated. This further detention of the defendant, by bringing him into the house, was a "seizure" as defined by the United States Supreme Court:

"Obviously, not all personal intercourse betweeen policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v Ohio, 392 US 1, 19, fn 16; 88 S Ct 1868; 20 L Ed 2 889 (1968).

We conclude that the seizure of defendant, unsupported by probable cause, was violative of the Fourth Amendment.

The standard for determining whether a police officer's seizure-detention of a citizen violates the Fourth Amendment is clearly set forth by the United States Supreme Court in the recent decision of Dunaway v New York, ____ US ____; 99 S Ct 2248; 60 L Ed 2 d 824 (1979). Justice Brennan's majority opinion holds that detention of a citizen beyond the narrow scope of Terry v Ohio, supra, and its progeny, is reasonable only if supported by probable cause for arrest. Thus, the general standard for determining whether a seizure-detention is legal is not whether the police officer's actions were reasonable under the circumstances but rather whether the police officer had probable cause to arrest.

In Dunaway, the Court explained that prior to the Terry decision arrests were equated with seizures requiring probable cause to justify the intrusion under the Fourth Amendment:

"Before Terry v Ohio, 392 US 1 (1968), the Fourth

Amendment's guarantee against unreasonable seizures of persons was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause. The basic principles were relatively simple and straightforward: The term 'arrest' was synonomous (sic) with those seizures governed by the Fourth Amendment. While warrants were not required in all circumstances, the requirement of probable cause, as elaborated in numerous precedents, was treated as absolute. The 'long prevailing standards' of probable cause embodied 'the best compromise that has been found for accommodating the ( ) often opposing interests' in 'safeguard(ing) citizens from rash and unreasonable interferences with privacy' and in 'seek(ing) to give fair leeway for enforcing the law in the community's protection'. Brinegar v United States, 338 US 160, 176 (1949). The standard of probable cause thus represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment. The standard applied to all arrests, without the need to 'balance' situations." (Footnotes omitted.) Dunaway, Slip opinion, pp 6-7.

The exception to this general rule was carefully carved out in the Terry opinion:

"Terry for the first time recognized an exception to the requirement that Fourth Amendment seizures of persons must be based on probable cause. That case involved a brief, on-the-spot stop on the street and a frisk for weapons, a situation that did not fit comfortably within the traditional concept of an 'arrest'. * * * (T)he Court established 'a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime'. * * * Terry departed from traditional

Fourth Amendment analysis in two respects. First, it defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test. Second, the application of this balancing test led the Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons." (Footnotes omitted.) Dunaway, Slip opinion, pp 7-8.

The Dunaway Court clearly indicated its intent to maintain the narrow scope of Terry. The Court expressly reaffirmed the essential viability of the probable cause standard and specifically refused to expansively apply the Terry balancing test:

"In effect, respondents urge us to adopt a multifactor balancing test of 'reasonable police conduct under the circumstances' to cover all seizures that do not amount to technical arrests. But the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when the balancing may be done in the first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime'. Johnson v United States, 333 US 10, 14 (1948). A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proven protections afforded by the general rule, is reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable'

only if supported by probable cause." (Footnotes omitted.) Dunaway, Slip opinion, pp 12-13.

In describing the nature of the narrow intrusions sanctioned under a Terry test, the Court stressed that a permissible intrusion is restricted to brief questioning regarding suspicious activity and to limited weapons frisks necessary to insure safety:

"Because Terry involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope. Terry itself involved a limited, on-the-street frisk for weapons. Two subsequent cases which applied Terry also involved limited weapons frisks. See Adams v Williams, 407 US 143 (1972) (frisk for weapons on basis of reasonable suspicion); Pennsylvania v Mimms, 434 US 106 (1977) (order to get out of car is permissible 'de minimis' intrusion after car is lawfully detained for traffic violations; frisk for weapons justified after 'bulge' observed in jacket). United States v Brignoni-Ponce, 422 US 873 (1975), applied Terry in the special context of roving border patrols stopping automobiles to check for illegal immigrants. The investigative stops usually consumed less than a minute and involved 'a brief question or two'. Id., at 880. The Court stated that '(b)ecause of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest. Ibid. See also United States v Martinez-Fuerte, 428 US 543 (1976) (fixed checkpoint to stop and check vehicles for aliens); Delaware v Prouse, ____ US ____ (1979) (random checks for drivers' licenses and proper vehicle registration not permitted on less than articulable reasonable suspicion).

* * *

"Indeed, Brignoni-Ponce expressly refused to extend Terry in the manner respondent now urges. The Court there stated: 'The officer may question the driver and passengers about their citizenship and

immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause'. Id., at 881-882. * * * Accord, United States v Martinez-Fuerte, supra, 428 US at 567." (Footnotes omitted.) (Emphasis changed.) Dunaway, Slip opinion, pp 8-11.[2]

Applying Dunaway to the specific facts of this case, the seizure of defendant on the porch and his subsequent detention were not, by nature, limited intrusions permissible under Terry and subsequent cases. Clearly these facts do not involve the special context of border patrol interrogations or traffic infractions. The defendant was stopped and questioned in front of his home. He answered the inquiries and attempted to assist the officers to gain entrance to the premises. The defendant's conduct at no time gave a basis for the officers to suspect unlawful activity on his part or to fear for their safety. Indeed, the officers chose not to frisk the defendant. This initial stop and brief questioning was completed. At that point, the officers had exhausted any Terry basis to further restrain the defendant.

When the defendant's liberty was thereafter restrained, the police officers must have had probable cause to arrest the defendant to render the seizure-detention reasonable under the Fourth Amendment. To sanction a further detaining of defendant without probable cause would in effect replace the fundamental and essential probable cause standard with a multifactor balancing test specifically rejected by the United States Supreme Court in Dunaway.

Although not formally arrested until after the suspected heroin was discovered in the basement, the defendant was for all practical purposes arrested without a warrant when he was "seized" on his front porch, at a time when the police officers did not have

probable cause to believe that the defendant had committed or was committing a felony.[3] The heroin seized from defendant, constituting the "fruits" of his unlawful arrest, must be excluded. Wong Sun v United States, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). Accordingly, the trial court's suppression of the evidence in the instant case is affirmed.

/s/ Blair Moody, Jr.
/s/ Charles L. Levin
/s/ Thomas Giles Kavanagh
/s/ James L. Ryan

FOOTNOTES

1

"Q (MR. MITCHELL, DEFENSE COUNSEL) All right. Well when you came around to the front of the house you did see -- you did see Mr. Summers, is that right?

"A (OFFICER CONANT) I did.

"Q And Mr. Summers was outside of the house, is that right?

"A He was.

"Q Now Mr. Summers was outside of the house, and you took him back in the house, is that right?

"A I did.

"Q Now he wasn't a member of your crew, was he?

"A No, he was not.

* * *

"Q You didn't see anybody. Did you ever lift him up and bring him back up on the porch as he was knocked down?

"A No, I did not. After we gained entry Patrolman Lehman told me to bring him on inside.

"Q All right. You took him on inside?

"A I did.

"Q Now when you went inside, what did you do immediately after you got inside?

"A Well I was in the living room with Mr. Summers.

"Q All right. You kept Brother Summers right close to you, is that right?

"A He was there.

"Q All right. What did you do after you kept him in your close view like that; did you ever go anyplace else in the house?

"A Not until after the house was secured, then I went to the basement."

2

Most recently, in a case subsequent to Dunaway, the United States Supreme Court again steadfastly refused to broaden the scope of an intrusion permissible under Terry. Ybarra v Illinois, ____ US ____; ____ S Ct ____; ____ L Ed 2d ___; 48 LW 4023 (11/28/79). The primary issue presented for resoution in Ybarra was whether the search of a person who was present in a tavern during the execution of a search of the premises was justified under the Terry test as a frisk or was supported by probable cause. The Court reiterated that the Terry exception should be applied in the limited circumstances of a frisk for weapons by an officer who has reason to believe the individual confronted is "armed and presently dangerous".

3

In Ybarra v Illinois, ____ US ____; ____ S Ct ____; ____ L Ed 2d ___; 48 LW 4023, 4025 (11/28/79), the Supreme Court stressed that when determining whether probable cause existed to search or seize a person, the focus of the inquiry is upon the activities of the individual confronted:

"Not only was probable cause to search Ybarra absent at the time the warrant was issued; it was still absent when the police executed the warrant. Upon entering the tavern, the police did not recognize Ybarra and had no reason to believe that he had committed, was committing or was about to commit any offense under state or federal law. Ybarra made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officers. In short, the agents knew nothing in particular about Ybarra, except that he was present, along with several other customers, in a public tavern at a time when the police had reason to

believe that the bartender would have heroin for sale.

"It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Sibron v New York, 392 US 40, 62-63. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places. See Rakas v Illinois, 439 US 128, 138-143, 148-149; Katz v United States, 389 US 347, 351-352." (Footnote omitted.) (Emphasis added.)

Appendix C 10/October 1978

STATE OF MICHIGAN
SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,
v No. 58465
GEORGE SUMMERS,
Defendant-Appellee.

BEFORE THE ENTIRE BENCH

WILLIAMS, J. (For Reversal)

We granted leave to appeal in this case to determine the constitutional validity of a search of defendant and the seizure pursuant thereto of a plastic bag of heroin from defendant's jacket pocket. The ultimate permissibility of this search and seizure, however, rests in turn on whether two prior "seizures" of defendant's person were constitutional: (1) the police bringing defendant, who had just left his house, from his outdoor porch into his house and his detention therein while a valid premises search warrant for heroin and any other narcotic materials and paraphernalia was executed, and (2) the formal arrest of the defendant, based upon his ownership-occupancy of the premises named in the warrant, following the discovery of suspected narcotics in the basement of his house.

Considered within the totality of circumstances in this case, we find that neither of these prior "seizures" of defendant contravened the general proscription against unreasonable seizures[1] of either the Fourth Amendment to the federal constitution US Const, Am IV, or this state's constitution, Const 1963, art 1, § 11. Bringing defendant inside from his porch and then detaining him therein while the premises search

warrant was being executed was "reasonable" police action in this case. Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Defendant's arrest inside after suspected narcotics were found in his basement pursuant to the search warrant was valid because it was based on probable cause. Accordingly, we hold that the ensuing seizure of the heroin from defendant's person was constitutionally permissible as the product of an allowable search incident to a valid arrest. See Chimel v California, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969). We therefore reverse the Court of Appeals affirmance of the trial court's suppression of the heroin seized from defendant's person and its quashing of the information.

I. FACTS

Because the factual setting of a specific search or seizure is usually of paramount importance in determining the constitutional validity of that search or seizure, we take careful pains to delineate the particular circumstances of this case which we feel, viewed in their totality, sanction the police conduct in question.

On the evening of October 10, 1974, a team of Detroit police officers was sent to 9356 Mansfield in the City of Detroit to execute a premises search warrant for heroin and any other narcotic materials and paraphernalia. The warrant was supported by information from an informant who had purchased heroin at this same address just the day before.

Upon arriving at the premises named in the warrant, police officers Lehman and Conant witnessed defendant leave the premises to be searched through the front door and proceed down the front porch steps. At this point Officer Lehman approached defendant, identified himself as a police officer, and asked defendant if he lived in the house he had just exited. Upon defendant's affirmative response,

Officer Lehman showed the search warrant to him and told him to open up the house if he could. Defendant, since he had left his keys inside, cooperated with this request by using the intercom to summon someone inside the house to open the door.

Dwight Calhoun opened the inner door to the house in response to defendant's request. Officer Lehman then identified himself as a police officer and told Calhoun to open the door. Calhoun did not comply with this direction, so Officer Lehman attempted to open the storm door only to discover that it was locked. At that time, Calhoun slammed the inner door shut in Officer Lehman's face. Thereupon Officer Lehman instructed three other officers who were present to break down the door. Once admittance had been gained, Officer Lehman instructed Officer Conant, previously stationed along the side of the house, to bring defendant, still on the porch, into the house.

In order to secure the premises prior to the search, defendant and the other persons in the house were taken into the living room by the police officers and were detained there while the search was conducted.

In the course of the search, two plastic bags containing suspected narcotics were found in the basement. Thereafter, defendant, who was by then known to be the owner of the house, was arrested. A custodial search following this arrest revealed a plastic bag containing suspected narcotics in defendant's jacket pocket. It is these narcotics, later determined to be heroin, which form the basis for the instant charge of violation of the Controlled Substances Act of 1971. MCL 335.341(4)(a); MSA 28.1070(41)(4)(a).

Following a preliminary examination, defendant was found over for trial. However, on November 19,

1974, the trial court granted defendant's motion to quash the information because it held the heroin to have been improperly seized from defendant. This finding was predicated upon both the trial court's belief that no probable cause existed to arrest defendant and the fact that defendant was not present in the house voluntarily.

The Court of Appeals affirmed the trial court for basically the same reasons. 68 Mich App 571; 243 NW2d 689 (1976).

We granted leave to appeal on February 8, 1977. 399 Mich 828 (1977).

II. DUNAWAY AND TERRY

There can be no question that the police "seized" defendant when they required him to go back inside his house and remain there during the execution of the legal search warrant.[2] Terry, supra, 19, fn 16. Such a determination, however, far from ends our inquiry into the constitutional permissibility of the police action in question. The United States Supreme Court has taught us that " '(s)earch' and 'seizure' are not talismans". Terry, supra, 19. Thus just as the Court in Terry was quick to reject the notion that the Fourth Amendment does not come into play at all as a limitation upon police conduct just because an officer may stop short of something called a "technical arrest", Id., 19, so must we be wary of erring in the reverse manner by uncritically labeling a "seizure" an "arrest" and then characterizing it as "illegal" since it was made without probable cause. Rather, we must ask whether this "seizure" of defendant, under the circumstances of this case, was violative of the state and federal constitutional proscriptions against unreasonable seizures.

Because we recognize that the police did not have probable cause to arrest defendant at the time they

encountered him on his porch, his "seizure" there is valid only if it comes within the rule of Terry, supra, and its progeny. That rule, of course, permits certain "seizures" or "detentions" as "reasonable" under the constitutional prohibitions against "unreasonable searches and seizures", on facts that do not constitute probable cause to arrest.[3] However, in order to properly understand the scope of the rule of Terry and its progeny, consideration must be given to the recent United States Supreme Court decision of Dunaway v New York, ____ US ____; 99 S Ct 2248; 60 L Ed 2d 824 (1979), which both recognizes the validity and indicates the limits of the Terry-and-progeny rule. In Dunaway the Court stated:

"Thus, Terry departed from traditional Fourth Amendment analysis in two respects. First, it defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test. Second, the application of this balancing test led the court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons." Dunaway, supra, ____.

While Terry itself was a pat-down-for-weapons case, as was Adams v Williams, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972), others of the progeny are not. For example, Pennsylvania v Mimms, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977), held a police order that a driver get out of his automobile a "de minimis" and reasonable intrusion after the car was lawfully detained for a traffic violation; United States v Brignoni-Ponce, 422 US 873; 95 S Ct 2574; 45 L Ed 2d 607 (1975), allowed roving border patrols to make investigative stops of automobiles to check for illegal immigrants on less than probable cause, i.e., on reasonable suspicion that a particular vehicle may contain aliens who are illegally in the country; United

States v Martinez-Fuerte, 428 US 543; 96 S Ct 3074; 49 L Ed 2d 1116 (1976), approved of fixed checkpoints to stop and check vehicles for aliens in the absence of any individualized suspicion. Indeed, Justice White's concurring opinion in Dunaway recognizes the wider application of Terry and its progeny as follows:

"The opinion of the Court might be read to indicate that Terry v Ohio, 392 US 1 (1968), is an almost unique exception to a hard-and-fast standard of probable cause. As our prior cases note, however, the key principle of the Fourth Amendment is reasonableness -- the balancing of competing interests. E.g., Delaware v Prouse, ____ US ____, ____ (1979); Michigan v Tyler, 436 US 499, 506 (1978); Marshall v Barlow's, Inc., 436 US 307, 321-322 (1978); United States v Martinez-Fuerte, 428 US 543, 555 (1976); United States v Brignoni-Ponce, 422 US 873, 878 (1975); Terry v Ohio, supra, at 20-21; Camara v Municipal Court of San Francisco, 387 US 523, 536-537 (1967)." Dunaway, supra, ____.

Close analysis of Dunaway and Terry and progeny suggests that basically there are four criteria to be considered in balancing to determine reasonableness:

First, was the police action taken in an atmosphere requiring rapid reaction to the exigencies encountered in the field such as the on-the-spot decision to stop and frisk suspicious individuals "casing" a store in Terry, or was the police action the result of a deliberate, planned decision such as the order to follow up an informant's lead by going out to "pick up a person" and "bring him in" for interrogation in Dunaway?

Second, was the police officer's belief in the necessity for action to protect the public peace and safety justified at its inception as where, for example, the careful surveillance by an experienced officer of the store "casings" in Terry warranted the officer in

believing the individuals might be contemplating a daylight robbery which it would be reasonable to assume would be likely to involve the use of weapons?

Third, was the "intrusion" on the individual's privacy by the police reasonably related in scope to the circumstances which justified the interference in the first place? In Terry the "intrusion" was limited to a pat-down for weapons during the investigation of suspicious behavior where the officer had reason to believe that he was dealing with armed and dangerous individuals; in Mimms, there was only a request to get out of a car following a lawful detention for a traffic violation; in Brignoni-Ponce the Court stated that a reasonable suspicion that a certain car contained illegal aliens would allow the officer to stop the car briefly and question the driver and passengers about their citizenship and immigration status, and ask them to explain suspicious circumstances; in Martinez-Fuerte there was merely a fixed checkpoint stop requiring a vehicle's occupants to respond to a brief question or two and perhaps produce a document evidencing a right to be in the United States. Visual inspection of the vehicle was limited to what could be seen without a search;[4] in Dunaway, on the other hand, the intrusion was severe. Not only was the defendant "picked up" in a neighbor's home, but he was subjected to custodial interrogation on the basis of mere reasonable suspicion.

Fourth, was the "seizure" reasonable in order to protect the officer's safety?[5] This criterion was stressed in Terry -- "the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. * * * American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded", Terry, supra, 23 -- and in Mimms -- "We think it too

plain for argument that the State's proffered justification -- the safety of the officer -- is both legitimate and weighty." Mimms, supra, 110.

In justifying a particular intrusion, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, meet these four criteria of "reasonableness". These facts, in turn, are to be subjected to the neutral scrutiny of a judge who must evaluate the "reasonableness" of a particular search or seizure in light of the particular circumstances. In making this assessment it is "imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry, supra, 21-22. In aplying these principles to the instant case we are acutely aware of the fact that, as one court put it,

"Whether an officer's conduct was 'reasonable' or 'appropriate' depends on the facts and circumstances of the particular case, so that the decision in one case seldom furnishes a pat answer in another case. A principle to be applied generally however is that in judging the reasonableness of the actions of the officer the circumstances before him are not to be dissected and viewed singly; rather they must be considered as a whole. So considered they are to be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." United States v Hall, 174 US App DC 13, 15; 525 F2d 857, 859 (1976) (citations omitted).

III. APPLICATION OF CRITERIA TO INSTANT CASE

A. Defendant's Transfer Inside From Porch

The action taken by the police in bringing defendant inside his house from the porch was a rapid,

in-the-field reaction to the perceived necessities of the situation and thus satisfies the first of the four criteria. Confronted with the possibility that an admitted inhabitant of a house where trafficking in drugs was allegedly conducted might escape to summon aid or himself interfere with the execution of the warrant, Officer Lehman made a quick, on-the-spot decision that the safety of the officers could be best protected by bringing defendant inside and keeping him under surveillance with the rest of the occupants of the house. The urgent and unanticipated circumstances surrounding the police action in the instant case bear not even the slightest resemblance to the deliberate decision to pick up the defendant in Dunaway and bring him down to the station house for interrogation. Rather, the decision to "seize" the defendant in the case at bar was made under necessitous circumstances akin to those in Terry.

As regards the second criterion -- the officers' belief in the necessity for action to protect the public peace and safety -- we believe the situation, when viewed as a whole, justified a "reasonable and cautious police officer" in taking the action which Officers Lehman and Conant took. They were possessed of a search warrant indicating that the premises they were about to search had been a place of drug traffic only one day earlier. The door abruptly slammed in the officer's face when he identified himself as a police officer reasonably confirmed the likelihood that illegal activities were being carried on in the premises. Furthermore, there was a reasonable nexus between defendant and the premises. Defendant had just left the house, had admitted he lived there, and his communication with those inside indicated a recognized relationship. The need for prudent and comprehensive action inherent in the fact that the main object of the search warrant was heroin, a white powder which can be easily secreted or destroyed, see State v Johnson, 102 RI 344, 354; 230 A2d 831, 836 (1967), justified not allowing defendant to run loose.

Further, we recognize the fact that armed violence not infrequently accompanies the use of or traffic in narcotics -- a fact well-known to the police. Cf., People v Nefzger, 173 Colo 199, 200-201; 476 P2d 995, 996 (1970).

Accordingly, we find the police belief in the necessity of action to have been justified at its inception. Like the police decision in Terry to seize an individual and pat his clothing down for weapons, we cannot say that the police decision to bring defendant inside "was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment * * *". Terry, supra, 28.

As for the third criterion, we believe that the scope of the intrusion of the officials under these circumstances was reasonable. Merely requiring defendant to cross his own threshold while the warrant was being executed was a narrow intrusion designed to ensure the officers' safety. It did not go beyond the kind of intrusion justified by the attendant safety concerns. Just as the officer in Mimms, supra, could constitutionally require an individual, based on general safety concerns, to get out of his car after a lawful stop even in the total absence of any articulable suspicion to suspect foul play from the particular driver at the time of the stop, a fortiori, we believe it was permissible for the police to require the defendant to enter his own house while the officers executed a valid search warrant in the face of numerous objective, observable facts to suport a reasonable concern for their safety. A law enforcement officer, when engaged in the performance of his or her duties, must act on a quick appraisal of the facts before him or her without the benefit of the hindsight which is usually possessed by those reviewing such actions. Sitting within the safe confines of our chambers, we decline to hold the police action in this case unwarranted. See People v Crawl, 401 Mich 1, 14; 257 NW2d 86 (1977) (opinion of Chief Justice, then Justice,

Coleman). On balance then, we find the important state interest in the officers' safety to outweigh this relatively minor intrusion into defendant's personal liberty.

Finally, we believe the fourth criterion to have been met. We think it beyond peradventure that the police in the instant case could have reasonably feared for their safety had they allowed defendant to remain at large outside the house while they were occupied within with the search warrant's execution. We must remember that Officer Lehman knew the defendant to be an occupant of this house in which the presence of narcotics was suspected and into which the police were required to force entry. Officer Lehman also knew that defendant was aware, at a minimum, that the police had come to his residence in search of something,[6] since Officer Lehman testified that he had shown the search warrant to the defendant. The person of reasonable caution could hardly be considered timorous in believing such a situation possesses violent potentialities. Such a person, under these circumstances, might quite logically fear for his or her own safety in executing a premises search warrant if that person knows that the individual permitted to move about freely outside the premises is aware that the object of the search, if found, could quite possibly be incriminating. The untended individual might alone or with summoned aid harm the police either while inside or on leaving.[7] As the Court in Terry states:

"a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime."

"The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be

warranted in the belief that his safety or that of others was in danger." Terry, supra, 26-27.

In sum, the four criteria having been satisfied, we find defendant's transfer to inside his house to have been "reasonable" and therefore constitutionally permissible.

B. Defendant's Detention Inside

Having found it "reasonable" in this case to bring defendant back across his threshold, we must next determine whether it was reasonable to keep him there. Although there is no Michigan case which specifically addresses the question of whether it is lawful for police officers to detain all persons found on certain premises during the execution of a search warrant for those premises, other courts have held such a detention legitimate. These courts reason that if individuals are left free to roam about the premises while the warrant is being executed, they could well destroy or carry off objects of the search. City of Olympia v Culp, 136 Wash 374, 377; 240 P 360, 361 (1925); State v Ryan, 163 Wash 496, 502; 1 P2d 893, 896 (1931); State v Valdez, 91 NM 567, 568-569; 577 P2d 465, 467 (Ct App, 1978). We agree. Indeed, the Federal First Circuit treated a challenge to such detention as "clearly frivolous" when it said,

"While appellant also contends that the search warrant (for the premises of his office) did not permit government agents to forcibly detain him, and that the restraint thereby imposed upon him prior to his actual arrest invalidated the warrant, we find these latter claims clearly frivolous." United States v Michell, 487 F2d 429, 430 (CA 1, 1973).

We also note that the safety rationale which justified bringing defendant inside his house in the first place would understandably continue to apply to his detention and surveillance once inside.[8]

IV. PROBABLE CAUSE TO ARREST DEFENDANT

With respect to the instant case, a police officer generally has probable cause to arrest, without a warrant, the known and present owner-occupant of premises wherein suspected narcotics are discovered pursuant to a valid premises search warrant. Probable cause to believe that a particular person has committed a particular offense is not the equivalent of guilt beyond a reasonable doubt. Thus the Court of Appeals reliance on People v Davenport, 39 Mich App 252; 197 NW2d 521 (1972), in finding that there was an insufficient nexus between the instant defendant and the narcotics seized in his house to provide probable cause for arrest, was misplaced. Davenport dealt with the insufficiency of mere joint occupancy of a house to convict one of four occupants of knowingly possessing narcotics found in the basement of the house, and not with probable cause to arrest. Thus the "seizure" of defendant -- his formal arrest -- inside his own house following the discovery of suspected narcotics in his basement (defendant having admitted that he owned the house) was constitutionally valid because it was based on probable cause.

V. CONCLUSION

Since we have found the "seizures" of defendant to be constitutionally permissible because they were "reasonable" under the circumstances of this case, the trial court erred in granting defendant's motion to quash the information and in suppressing the heroin found on defendant. Accordingly, we reverse the Court of Appeals affirmance of the trial court's ruling and remand the case to the trial court for further proceedings not inconsistent with this opinion.

/s/ G. Mennen Williams
/s/ Mary S. Coleman
/s/ John W. Fitzgerald

FOOTNOTES

1 US Const, Am IV provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Const 1963, art 1, § 11 provides, in pertinent part:

"The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation."

2

We do not find the police action in confronting defendant as he proceeded down his front porch steps a "seizure". The police, at this point, were simply seeking voluntary cooperation on defendant's part in gaining admission to his house. There was no apparent restraint of defendant's liberty. As the Supreme Court noted in Terry v Ohio, 392 US 1, 19, fn 16; 88 S Ct 1868; 20 L Ed 2d 889 (1968), "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons". Indeed, Justice Moody would categorize defendant's behavior pursuant to the police request for admittance as "cooperative".

3

See fn 1 for citation and text.

4

The Court stressed in both Brignoni-Ponce and Martinez-Fuerte that "any further detention or search must be based on consent or probable cause". Brignoni-Ponce, supra, 882; Martinez-Fuerte, supra, 567.

5

By the inclusion of this fourth criterion, we do not mean to imply that the lack of legitimate safety concerns on the part of a police officer will, ipso facto, render the police action "unreasonable" and therefore constitutionally impermissible where probable cause is lacking. In Brignoni-Ponce, supra, for example, it was the governmental concern over illegal immigrants, and not over a police officer's safety, which the Court found to outweigh the official interference with individual liberty involved in that case.

6

The preliminary examination did not reveal whether the defendant actually read the search warrant, thus finding out that the object of the search was narcotics, or whether he just knew the officers had the authority to search for something.

7

There are three reasons to distinguish the instant case from the recent case of Ybarra v Illinois, ___ US ___; 100 S Ct ___; ___ L Ed 2d ___; 48 LW 4023 (November 28, 1979): first, the existence of specific, articulable facts in the present case, supporting as reasonable, fear on the part of the officers for their safety, whereas the majority in Ybarra said "the State is unable to articulate any specific fact * * *", Ybarra, supra, slip opinion, p 7;

second, the intrusion on the instant defendant's privacy by requiring him to step over his own threshold was minimal compared with the pat-down and subsequent search in Ybarra; and third, the instant case deals with a private residence from which narcotics had been sold, whereas Ybarra involved a public tavern for the sale of liquor whose bartender reportedly possessed narcotics.

8

Since there is no evidence that the officers frisked defendant prior to his formal arrest, we have no occasion to consider whether such an action would have been reasonable under the circumstances. Cf. People v Nefzger, 173 Colo 199, 200-201; 476 P2d 995, 996 (1970).

Appendix C

People v Summers

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 29th day of February in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable Mary S. Coleman, Chief Justice, Thomas Giles Kavanagh, G. Mennen Williams, Charles L. Levin, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

Rehearing No. 13

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,
v No. 58465
GEORGE SUMMERS,
Defendant-Appellee.

In this cause a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

STATE OF MICHIGAN -- ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 29th day of February in the year of our

Lord one thousand nine hundred and eighty.

/s/ Corbin R. Davis
Deputy Clerk